UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
501 "I" Street
Sacramento, CA 95814

FILED
MAY - 2 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

2254 ✓ 1983
FILING FEE PAID
Yes No ✓
IFP MOTION FILED
Yes No ✓
COPIES SENT TO
Court ✓ ProSe

USDC – Southern District of CA
Clerk's Office
880 Front Street, Suite 4290
San Diego, CA 92101–8900

RE: **ALBERTO FERNANDEZ vs. M. MARTEL**
USDC No.: **2:08–CV–00347–LEW–CMK**

Dear Clerk,

Pursuant to the order transferring the above captioned case to your court, dated April 30, 2008 , transmitted herewith are the following documents.

'08 CV 0816 JLS CAB

Electronic Documents: 1 to 8.

Documents maintained electronically by the district court are accessible through PACER for the Eastern District of California at **https://ecf.caed.uscourts.gov**.

Please acknowledge receipt on the extra copy of this letter and return to the Clerk's Office.

Very truly yours,

April 30, 2008 /s/ **M. Marciel**

Deputy Clerk

RECEIVED BY: ______________________

Please Print Name

DATE RECEIVED: ______________________

NEW CASE NUMBER: ______________________

I herby certify that the annexed instrument is a true and correct copy of the original on file in my office.
ATTEST: VICTORIA C. MINOR
Clerk, U. S. District Court
Eastern District of California
By ______ Deputy Clerk
Dated April 30, 2008

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ,

Petitioner,

vs.

M. MARTEL, et al.,

Respondents.

______________________________/

No. CIV S-08-0347-LEW-CMK-P

ORDER

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondents' request to transfer this action (Doc. 7) to the United States District Court for the Southern District of California.

The petition attacks a conviction entered by the San Diego County Superior Court. While both this court and the United States District Court for the Southern District of California have concurrent jurisdiction, see Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), any and all witnesses and evidence necessary for the resolution of petitioner's application are more readily available in the Southern District, see id. at 499 n.15; 28 U.S.C. § 2241(d). Therefore, respondents' motion to transfer this matter will be granted.

Accordingly, IT IS HEREBY ORDERED that:

1. The court's March 27, 2008, order is vacated;

2. Respondent's request to transfer this matter (Doc. 7) to the United States District Court for the Southern District of California is granted; and

3. The Clerk of the Court is directed to transfer this matter to the United States District Court for the Southern District of California and close this file.

DATED: April 29, 2008

Craig M. Kellison

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

Other Orders/Judgments

2:08-cv-00347-LEW-CMK (HC) Fernandez v. Martel, et al
HABEAS

U.S. District Court

Eastern District of California - Live System

Notice of Electronic Filing

The following transaction was entered on 4/30/2008 at 10:30 AM PDT and filed on 4/30/2008
Case Name: (HC) Fernandez v. Martel, et al
Case Number: 2:08-cv-347
Filer:
WARNING: CASE CLOSED on 04/30/2008
Document Number: 8

Docket Text:
ORDER signed by Magistrate Judge Craig M. Kellison on 4/29/08. The Court's [5] Order is VACATED and respondent's [7] Application for Transfer is GRANTED. Action is TRANSFERRED to USDC - Southern District of CA. Electronically filed documents, certified copy of transfer order, and docket sheet sent. CASE CLOSED (Marciel, M)

2:08-cv-347 Electronically filed documents will be served electronically to:

Brian G. Smiley Brian.Smiley@doj.ca.gov, diane.boggess@doj.ca.gov, DocketingSACAWT@doj.ca.gov, ECFCoordinator@doj.ca.gov, sharon.claiborne@doj.ca.gov

2:08-cv-347 Electronically filed documents must be served conventionally by the filer to:

Alberto Fernandez
F-25887
Mule Creek State Prison
MCSP
P. O. Box 409040
Ione, CA 95640

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1064943537 [Date=4/30/2008] [FileNumber=2271272-0
] [b5250ec82d7b259496f6e3597cbe98274d6ac1341a599af4bd978eaa3dc51d6a30b
328146e5173dca8bdd3de39dad38ab0d554d19e0afbadcd5d83f73436bc01]]

[redacted]

CLOSED, HABEAS

U.S. District Court
Eastern District of California - Live System (Sacramento)
CIVIL DOCKET FOR CASE #: 2:08-cv-00347-LEW-CMK
Internal Use Only

(HC) Fernandez v. Martel, et al
Assigned to: Senior Judge Ronald S.W. Lew
Referred to: Magistrate Judge Craig M. Kellison
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 02/15/2008
Date Terminated: 04/30/2008
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Alberto Fernandez represented by **Alberto Fernandez**
F-25887
Mule Creek State Prison
MCSP
P. O. Box 409040
Ione, CA 95640
PRO SE

V.

Respondent

M. Martel represented by **Brian G. Smiley**
California Dept. of Justice, Office of the Attorney General
1300 I Street, Suite 1101
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-5286
Fax: (916) 324-2960
Email: Brian.Smiley@doj.ca.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
ATTEST: VICTORIA C. MINOR
Clerk, U. S. District Court
Eastern District of California
By [signature]
Deputy Clerk
Dated April 30, 2008

Respondent

Attorney General of the State of California

Date Filed	#	Docket Text
02/15/2008	1	PETITION for WRIT of HABEAS CORPUS by Alberto Fernandez. (Marciel, M) (Entered: 02/19/2008)
02/19/2008	2	PRISONER NEW CASE DOCUMENTS ISSUED (Attachments: # 1 Consent Forms) (Marciel, M) (Entered: 02/19/2008)
02/19/2008		SERVICE BY MAIL: 2 Prisoner New Case Documents for LEW served on petitioner Alberto Fernandez. (Marciel, M) (Entered: 02/19/2008)
02/21/2008	3	ORDER signed by Magistrate Judge Craig M. Kellison on 2/20/08. Petitioner shall submit, w/in 30 days from date of Order, a complete Application for Leave to Proceed

		IFP on form provided. Clerk directed to send petitioner a new Application form. (Marciel, M) (Entered: 02/21/2008)
02/21/2008		SERVICE BY MAIL: 3 Order requiring completed IFP Application served on petitioner Alberto Fernandez w/2 copies of IFP form. (Marciel, M) (Entered: 02/21/2008)
02/21/2008		RECEIPT number #CAE200004989 $5.00 by Alberto Fernandez on 2/21/2008. (Duong, D) (Entered: 02/21/2008)
02/22/2008	4	DECLINE to PROCEED BEFORE US MAGISTRATE JUDGE by Alberto Fernandez. (Kaminski, H) (Entered: 02/25/2008)
03/27/2008	5	ORDER signed by Magistrate Judge Craig M. Kellison on 3/26/08. Respondents directed to file Response to Petition w/in 30 days from date of service of Order. Petitioner's Traverse or Reply, if any, shall be filed and served w/in 30 days of service of Response. Clerk shall serve a copy of Order together with copy of Petition for Writ of Habeas Corpus on Michael Patrick Farrell, Senior Assistant Attorney General. (Marciel, M) (Entered: 03/27/2008)
03/27/2008		SERVICE BY MAIL: 5 Order served on petitioner Alberto Fernandez. (Marciel, M) (Entered: 03/27/2008)
03/27/2008	6	NOTICE of Service: pursuant to 5 Order, Petition for Writ of Habeas Corpus served upon Michael Patrick Farrell. (Marciel, M) (Entered: 03/27/2008)
04/28/2008	7	APPLICATION to *transfer Petition for Writ of Habeas Corpus to the Southern District* by M. Martel. Attorney Smiley, Brian G. added. (Smiley, Brian) Modified on 4/29/2008 (Marciel, M). (Entered: 04/28/2008)
04/30/2008	8	ORDER signed by Magistrate Judge Craig M. Kellison on 4/29/08. The Court's 5 Order is VACATED and respondent's 7 Application for Transfer is GRANTED. Action is TRANSFERRED to USDC - Southern District of CA. Electronically filed documents, certified copy of transfer order, and docket sheet sent. CASE CLOSED (Marciel, M) (Entered: 04/30/2008)
04/30/2008	9	TRANSMITTAL of DOCUMENTS pursuant to 8 Transfer Order on *4/30/2008* to * USDC - Southern District of CA* *Clerk's Office* *880 Front Street, Suite 4290* *San Diego, CA 92101-8900*. *Electronic Documents: 1 to 8. *. (Marciel, M) (Entered: 04/30/2008)
04/30/2008		SERVICE BY MAIL: 8 Order transferring case to Southern District of CA, 9 Transmittal served on petitioner Alberto Fernandez. (Marciel, M) (Entered: 04/30/2008)

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court | District: EASTERN

Name: ALBERTO FERNANDEZ | Prisoner No.: F25887 | Case No.:

Place of Confinement:
MULE CREEK STATE PRISON
P.O. BOX 409040
IONE, CA 95640

"ORIGINAL"

Name of Petitioner (include name under which convicted): ALBERTO FERNANDEZ v. Name of Respondent (authorized person having custody of petitioner): M. MARTEL

The Attorney General of the State of: CALIFORNIA

2:08-CV-0347 LEW CMK (HC)

PETITION

1. Name and location of court which entered the judgment of conviction under attack SUPERIOR COURT OF SAN DIEGO COUNTY, 2851 MEADOWLARK DRIVE, SAN DIEGO, CA 92123
2. Date of judgment of conviction MAY 19, 2006
3. Length of sentence 15 YEARS TO LIFE PLUS 8 YEARS AND 8 MONTHS
4. Nature of offense involved (all counts) AGGRAVATED SEXUAL ASSAULT OF CHILD (PEN. CODE 269, COUNTS 1, 2, 3); FORCIBLE LEWD ACTS ON CHILD (PEN. CODE 288(b)(1), COUNTS 4-9); AND LEWD ACT ON A CHILD (PEN. CODE 288(c)(1), COUNT 10).
5. What was your plea? (Check one)
   - (a) Not guilty ☒
   - (b) Guilty ☐
   - (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   - (a) Jury ☒
   - (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☒
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

FILED
FEB 15 2008
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY ______ DEPUTY CLERK

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court COURT OF APPEAL, FOURTH APPELLATE DISTRICT

(b) Result DENIED

(c) Date of result and citation, if known 6/21/07 D048685

(d) Grounds raised APPELLANT WAS DENIED DUE PROCESS BY ERRONEOUS ADMISSION OF EVIDENCE OF ALLEGED SEXUAL ASSAULTS ON WIFE AND SISTER IN LAW; APPELLANT WAS DENIED DUE PROCESS BY COURT'S PARTIAL EXCLUSION OF DEFENSE EXPERT

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court CALIFORNIA SUPREME COURT

(2) Result DENIED

(3) Date of result and citation, if known 8/29/07 CASE NO. S154354

(4) Grounds raised SAME AS ABOVE

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court

(2) Result

(3) Date of result and citation, if known

(4) Grounds raised

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

AO 241 (Rev. 5/85)

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result ______

(6) Date of result ______

(b) As to any second petition, application or motion give the same information:

(1) Name of court ______

(2) Nature of proceeding ______

(3) Grounds raised ______

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result ______

(6) Date of result ______

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

AO 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(I) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: PETITIONER WAS DENIED DUE PROCESS BY THE ERRONEOUS ADMISSION OF EVIDENCE OF ALLEGED PRIOR SEXUAL ASSAULTS ON HIS WIFE AND SISTER IN LAW

Supporting FACTS (state *briefly* without citing cases or law)

PLEASE SEE ATTACHED

B. Ground two: PETITIONER WAS DENIED DUE PROCESS BY THE COURT'S PARTIAL EXCLUSION OF DEFENSE EXPERT TESTIMONY

Supporting FACTS (state *briefly* without citing cases or law):

PLEASE SEE ATTACHED

AO 241 (Rev 5/85)

C. Ground three: ______

Supporting FACTS (state *briefly* without citing cases or law): ______

D. Ground four: ______

Supporting FACTS (state *briefly* without citing cases or law): ______

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ______

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15 Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing LINDA R. BROWN
233 A. ST STE. 500 SAN DIEGO, CA 92101
(b) At arraignment and plea LINDA R. BROWN
233 A. ST. STE. 500 SAN DIEGO, CA 92101

AO 241 (Rev. 5/85)

(c) At trial LINDA R. BROWN

(d) At sentencing LINDA R. BROWN

(e) On appeal LYNDA A. ROMERO
5173 WARING ROAD, NO. 220 SAN DIEGO, CA 92120

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed

2/13/08
(date)

[signature]
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ
Petitioner,

CASE NO.

v.

PETITION FOR WRIT OF HABEAS CORPUS

M. MARTEL
Respondent.

SUPPORTING FACTS

GROUND 1: PETITIONER WAS DENIED DUE PROCESS BY THE ERRONEOUS ADMISSION OF EVIDENCE OF ALLEGED PRIOR SEXUAL ASSAULTS OF HIS WIFE AND SISTER IN LAW

Prior to trial, the prosecution filed a trial brief requesting admission of evidence petitioner had inappropriately touched his wife's sister when she was 12 or 13 years old and when she was 14 or 15 years old. The prosecution also sought to admit evidence petitioner first had sexual intercourse with his wife when she was 13 years old and he was 21 years old. (CT 44-47, 50.) The defense filed a written motion opposing the admission of the evidence claiming it was irrelevant, inadmissible under Evidence Code sections 1101 and 1108 and prejudicial pursuant to Evidence Code section 352. (CT 24-41.)

The court excluded evidence regarding petitioner's relationship with his wife. According to the prosecution, petitioner began his relationship with his wife when she was 12 years old and married her when she was 13 years old. (3RT 93; 94-102.) The defense asked the court to ask the prosecutor to inform petitioner's wife not to mention the evidence. The court indicated the prosecutor could be trusted to do so. (3RT 124.) Later, after the defense requested admission of evidence of forcible sex acts against petitioner's wife to show a motive to retaliate against petitioner, the court allowed admission of the evidence that petitioner and his wife started their relationship when she was 13 years old. The defense again objected to the evidence. (5RT 296-299.)

The court allowed admission of evidence petitioner touched his wife's sister, Carmen Mendoza, based on the prosecution's representation the conduct took place when Mendoza was at the youngest 12 years old. The second incident was when she was 14-15 years old. (3RT 92; 104-107.) The defense objected to the evidence because it was remote and prejudicial. (3RT 103.)

Carmen Mendoza testified she was between 11 to 13, when she stayed overnight at petitioner's residence. Mendoza and petitioner's wife, Araceli, went to sleep in the same bed. (5RT 454.) Petitioner returned from work, laid next to Mendoza and started rubbing her body with his body. (5RT 456-458.) Mendoza woke up and got out of bed. Mendoza believed petitioner thought she was his wife. (5RT 458.) When Mendoza was

14, she again stayed the night at petitioner's residence. (RT 459.) Mendoza was asleep on the couch when petitioner touched her breasts and stomach area. (5RT 460, 462.) Mendoza woke up, saw petitioner on his knees next to her, screamed and slapped petitioner. Petitioner said that he had been looking for the restroom door. (5RT 462-463; 10RT 1535.)

After Mendoza testified, trial counsel made a motion for a mistrial. Counsel argued the evidence was even more remote than what she believed when she originally objected. (6RT 488.) Counsel indicated the first incident had occurred 18 years prior. (6RT 488.) The court rejected the motion. (6RT 489.)

Trial counsel renewed the objection during the discussion of the jury instructions. (10RT 1634.) Counsel also objected to the reading of CALCRIM 1191 because it informed the jury the evidence constituted a crime. (10RT 1634-1639.)

The prosecution highlighted the evidence of both in closing arguments to the jury. The prosecution argued petitioner violated his wife and his sister in law which showed petitioner had a disposition to commit sexual offenses. (11RT 1861, 1863, 1880-1881, 1882, 1883, 1937.) The prosecution also called attention to CALCRIM 1191 and argued it was a "very important instruction." (RT 1880.)

GROUND 2: PETITIONER WAS DENIED DUE PROCESS BY THE COURT'S PARTIAL EXCLUSION OF THE TESTIMONY OF THE DEFENSE EXPERT DR. CONSTANCE DALENBERG

Prior to the start of trial, the defense moved the court to allow the testimony of Dr. Constance Dalenberg, a psychologist and parental alienation specialist, regarding factors that account for false accusations of child molest. (CT 11-23; 3RT 56-58.) The prosecution informed the court there was no objection to the testimony. (3RT 58.) The court granted leave to present the testimony. (3RT 59.)

Dr. Constance Dalenberg had treated or evaluated over 600 persons on the issue of child sexual abuse and had testified as an expert between 25 to 40 times. (9RT 1290.) Dr. Dalenberg reviewed the preliminary hearing transcript, tape recorded interview and medical reports of Elizabeth and the police reports in the case. (9RT 1291-1292.) Three to eight percent of cases result in a mistaken or false report. The percentage goes up to fifteen percent in cases involving a contentious situation between the parents. (9RT 1292.) There are factors that can be used to determine if a child is making a false report including changes in testimony. (9RT 1295-1296.) A child who is willing to make a false accusation acts out in other ways as well such as defiance to both parents. (9RT 1300.)

During Dr. Dalenberg's testimony, the prosecutor objected when Dr. Dalenberg attempted to discuss some of the factors present in petitioner's case, for example, the victim's changing of accounts and her report of hearing voices. (9RT 1297-1298, 1300.) After sustaining the objections, the court ordered a sidebar conference. (9RT 1300.) The court informed trial counsel the court understood Dr. Dalenberg was only going to testify regarding statistical occurrences with no specific questions about the case. (9RT 1301.) The trial court opined that the witness had already given such testimony, as the victim was lying. (9RT 1301-1302.) Thereafter, the court limited the testimony to an examination of studies she participated in and excluded anything related to the testimony of the victim in the case.. (9RT 1302-1303.) Thereafter, the trial court admonished Dr. Dalenberg outside the presence of the jury to limit her testimony to general factors without conclusions regarding the victim. (9RT 1307-1308.) The prosecutor requested the jury be admonished to disregard any testimony from Dr. Dalenberg regarding the credibility or truthfulness of any witness in the trial. (9RT 1309.) Trial counsel objected. (9RT 1309.) The court deferred the request until the conclusion of Dr. Dalenberg's testimony. (9RT 1310.)

Later, the prosecution requested a limiting instruction be read and Dr. Dalenberg's testimony be stricken. (10RT 1609-1611; 11RT 1820.) Trial counsel argued that all of Dr. Dalenberg's testimony was appropriate and noted the prosecution was aware of the testimony from her pleadings and had no objection until she broached a question regarding motive to lie. (RT 1611; 11RT 1821-1822.) The court indicated a belief counsel had exceeded the permissible scope of the evidence and asked the court reporter to identify part of the examination of Dr. Dalenberg. (11RT 1823.) The court ordered Dr. Dalenberg's initial testimony regarding reading of reports regarding this case and any testimony that related specifically to the victim to be stricken. (11RT 1825-1826.) The court also informed the jury, "experts are permitted to give opinion, they are also permitted to talk to you about studies. They are not permitted to give you an opinion about the credibility of the witnesses that have testified before you. If you find that an expert gave an opinion about a witness in this case, you are to disregard it because it is you who must determine the credibility of the witnesses in this case. That [is] the ultimate question and that is the jury's function." (11RT 1847-1848.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Office of the Clerk
501 "I" Street
Sacramento, CA 95814

Victoria C. Minor
Clerk of Court

Divisional Office
2500 Tulare Street
Fresno, CA 93721

February 19, 2008

Case Number: **2:08-CV-00347-LEW-CMK**

Case Title: **ALBERTO FERNANDEZ,** **vs. M. MARTEL,**

Dear Litigant,

You are hereby notified that the above case number has been assigned to your action. You are to include the complete case number on all documents sent to the court for filing in this case. Failure to do so results in delayed processing of your documents.

All matters in this action shall be sent to the following address until further notice:

Office of the Clerk
United States District Court
Eastern District of California
501 "I" Street , Suite 4-200
Sacramento, CA 95814

For timely processing of your pleadings or correspondence, please comply with our Local Rules of Court, in particular:

Local Rule 5-133 The court requires an original plus one copy of each document sent for filing. If you desire to receive a conformed copy for your records, you must send an original and two copies of your document and a pre-addressed postage-paid envelope for us to return your copy to you.

Local Rule 5-135 Once the defendant(s) have served a responsive pleading, you are under an ongoing duty to serve them with copies of all documents you submit to the court. A proof of service shall be attached to the original of any document lodged or filed with the court, showing the date, manner and place of service. A sample proof of service is attached.

Local Rule 7-130 Documents submitted to the court must be legible, on 8-½ " x 11" paper, with writing on one (1) side of the page only. Each separate document must be stapled at the top left corner and pre-punched with two (2) holes centered 2-¾" apart, ½" from the top edge of the page. Each page should be numbered consecutively at the bottom.

Local Rule 7-132 Every document submitted to the court must include your name, address and prisoner identification number in the upper left hand corner of the first page. The caption on the first page must include the title of this court, the title of the action, the case number assigned to this action (including all initials and letters that follow the number), and the title of your document. If you are pursuing more than one action in this court, you must submit a separate original document and the appropriate number of copies for each action in which you want the document filed.

Local Rule 6–142 A request for extension of time must state the reason an extension is needed. A request for extension of time should be filed before the deadline in question.

Local Rules 30–250, 33–250, 34–250 and 36–250 Discovery requests or responses should not be submitted to the court unless they are relevant and necessary to support or oppose a motion at issue before the court.

Local Rule 83–182 Each party appearing in propria persona is under a continuing duty to notify the Clerk and all other parties of any change of address.

Other Provisions:

Request for Case Status The court will notify you as soon as any action is taken in your case. Due to the large number of civil actions pending before the court, THE CLERK IS UNABLE TO RESPOND IN WRITING TO INDIVIDUAL INQUIRES REGARDING THE STATUS OF YOUR CASE. As long as you keep the court apprised of your current address, you will receive all court decisions which might affect the status of your case.

Copy Work The Clerk's Office does not provide copies of documents to parties. Copies of documents may be obtained from Attorney's Diversified Service (ADS) by writing to them at: 1424 21st Street, Sacramento, CA 95814, or by phoning 916–441–4396 or 916–441–4466. The court will provide copies of docket sheets at $0.50 per page. **Note: In Forma Pauperis** status does not include the cost of copies.

Victoria C. Minor
Clerk of Court
United States District Court

by: /s/ M. Marciel
Deputy Clerk

The following is a sample Proof of Service. Pursuant to Rule 5 of the F.R.Cv.P. and Local Rule 5–135, each document filed after the court orders service in your case shall be served on opposing counsel and a proof of service attached to your document filed with the court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

(Case Title) ______________________________
Plaintiff or Petitioner

V.

Case Number: 2:99–CV–99999 ABC DFG
(example case no.)

____
Defendant or Respondent

SAMPLE PROOF OF SERVICE

______________________________ /

I hereby certify that on (Date) ______________________________, I served a copy

of the attached (Title of Document Served and Filed) ______________________________,

by placing a copy in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said

enevelope in the United States Mail at (Location of Mailing) ______________________________:

(List Name and Address of Each Defendant or Attorney Served)

I declare under penalty of perjury that the foregoing is true and correct.

____
(Name of Person Completing Service)

NOTICE OF AVAILABILITY OF A MAGISTRATE JUDGE

TO EXERCISE JURISDICTION AND APPEAL INSTRUCTIONS

You are hereby notified in accordance with 28 U.S.C §636(c), F.R.Civ.P.73 and Local Rule 73−305, the United States Magistrate Judges sitting in Sacramento and Fresno are available to exercise the court's case dispositive jurisdiction and to conduct any or all case despositive proceedings in this action, including motions to dismiss, motions for summary judgment, a jury or nonjury trial, and entry of a final judgment. Exercise of this jurisdiction by a Magistrate Judge is however, permitted only if all parties voluntarily consent. You may, without adverse substantive consequences, withhold your consent, but this will prevent the court's case dispositive jurisdiction from being exercised by a Magistrate Judge.

Any appeal from a judgment entered by a Magistrate Judge is taken directly to the United States Court of Appeals for the Ninth Circuit or, where appropriate, for the Federal Circuit in the same manner as an appeal from any other judgment of a District Court.

Whether or not the parties consent to pursuant to 28 U.S.C. § 636(c) the assigned Magistrate Judge will hear all motions except those case dispositive motions set forth in 28 U.S.C. § 636(b)(1)(A).

A copy of the Form for "Consent to / Decline of Jurisdiction of United States Magistrate Judge" is attached hereto for pro per use and attorney information. This form is available in fillable .pdf format on the court's web site at www.caed.uscourts.gov for all attorney ECF filers. This form may be filed through CM/ECF or by pro se litigants at the appropriate Clerk's Office location.

Office of the Clerk	Office of the Clerk
501 I Street, Room 4−200	2500 Tulare Street , Suite 1501
Sacramento, CA 95814	Fresno, CA 93721

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ,
Plaintiff(s)/Petitioner(s),

vs.

CASE NO. 2:08-CV-00347-LEW-CMK

M. MARTEL,
Defendant(s)/Respondents(s).

IMPORTANT
IF YOU CHOOSE TO CONSENT OR DECLINE TO CONSENT TO JURISDICTION OF A UNITED STATES MAGISTRATE JUDGE, CHECK AND SIGN THE APPROPRIATE SECTION OF THIS FORM AND RETURN IT TO THE CLERK'S OFFICE.

☐ **CONSENT TO JURISDICTION OF UNITED STATES MAGISTRATE JUDGE**

In accordance with the provisions of Title 28, U.S.C Sec. 636(c)(1), the undersigned hereby voluntarily consents to have a United States Magistrate Judge conduct all further proceedings in this case, including trial and entry of final judgment, with direct review by the Ninth Circuit Court of Appeals, in the event an appeal is filed.

Date: ____________________ Signature: ________________________________

Print Name: ______________________________
( ) Plaintiff/Petitioner ( ) Defendant/Respondent
( ) Counsel for * ____________________________

☐ **DECLINE OF JURISDICTION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to Title 28, U.S.C. Sec 636(c)(2), the undersigned acknowledges the availability of a United States Magistrate Judge but hereby declines to consent.

Date: ____________________ Signature: ________________________________

Print Name: ______________________________
( ) Plaintiff/Petitioner ( ) Defendant/Respondent
( ) Counsel for * ____________________________

If representing more than one party, counsel must indicate name of each party responding.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ,

Petitioner,

vs.

M. MARTEL, et al.,

Respondents.

_____________________________/

No. CIV S-08-0347-LEW-CMK-P

ORDER

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has not, however, filed an application to proceed in forma pauperis or paid the required filing fee. See 28 U.S.C. §§ 1914(a), 1915(a). Petitioner will be provided the opportunity to submit either a completed application to proceed in forma pauperis or the appropriate filing fee. Petitioner is warned that failure to comply with this order may result in the dismissal of this action. See Local Rule 11-110.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner shall submit on the form provided by the Clerk of the Court, within 30 days from the date of this order, a complete application for leave to proceed in forma pauperis, or the appropriate filing fee; and

2. The Clerk of the Court is directed to send petitioner a new form Application to Proceed In Forma Pauperis By a Prisoner.

DATED: February 20, 2008

Craig M. Kellison

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FILED

FEB 22 2008

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY [signature] DEPUTY CLERK

ALBERTO FERNANDEZ,
Plaintiff(s)/Petitioner(s),

vs.

CASE NO. 2:08-CV-00347-LEW-CMK

M. MARTEL,
Defendant(s)/Respondents(s).

IMPORTANT: IF YOU CHOOSE TO CONSENT OR DECLINE TO CONSENT TO JURISDICTION OF UNITED STATES MAGISTRATE JUDGE, CHECK AND SIGN THE APPROPRIATE SECTION OF THIS FORM AND RETURN IT TO THE CLERK'S OFFICE.

☐ **CONSENT TO JURISDICTION OF UNITED STATES MAGISTRATE JUDGE**

In accordance with the provisions of Title 28, U.S.C Sec. 636(c)(1), the undersigned hereby voluntarily consents to have a United States Magistrate Judge conduct all further proceedings in this case, including trial and entry of final judgment, with direct review by the Ninth Circuit Court of Appeals, in the event an appeal is filed.

Date: ____________________ Signature: ______________________________

Print Name: ______________________________
( ) Plaintiff/Petitioner ( ) Defendant/Respondent
( ) Counsel for * ______________________________

☒ **DECLINE OF JURISDICTION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to Title 28, U.S.C. Sec 636(c)(2), the undersigned acknowledges the availability of a United States Magistrate Judge but hereby declines to consent.

Date: 2/20/08 Signature: [signature]

Print Name: ALBERTO FERNANDEZ
(X) Plaintiff/Petitioner ( ) Defendant/Respondent
( ) Counsel for * ______________________________

If representing more than one party, counsel must indicate name of each party responding.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ, No. CIV S-08-0347-LEW-CMK-P

Petitioner,

vs. ORDER

M. MARTEL, et al.,

Respondents.

_______________________________/

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner's petition for a writ of habeas corpus (Doc. 1), filed on February 15, 2008.

The court has examined the petition as required by Rule 4 of the Federal Rules Governing Section 2254 Cases. It does not plainly appear from the petition and any attached exhibits that petitioner is not entitled to relief. See id. Respondents, therefore, will be directed to file a response to petitioner's petition. See id. If respondents answer the petition, such answer must comply with Rule 5 of the Federal Rules Governing Section 2254 Cases. Specifically, an answer shall be accompanied by any and all transcripts or other documents relevant to the determination of the issue(s) presented in the petition. See id.

Accordingly, IT IS HEREBY ORDERED that:

1. Respondents are directed to file a response to petitioner's petition within 30 days from the date of service of this order;

2. Petitioner's traverse or reply (if respondents file an answer to the petition), if any, or opposition or statement of non-opposition (if respondents file a motion in response to the petition) shall be filed and served within 30 days of service of respondents' response; and

3. The Clerk of the Court shall serve a copy of this order, together with a copy of petitioner's petition for a writ of habeas corpus on Michael Patrick Farrell, Senior Assistant Attorney General.

DATED: March 26, 2008

Craig M. Kellison

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

EDMUND G. BROWN JR.
Attorney General of the State of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY, State Bar No. 180658
Supervising Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5286
Fax: (916) 324-2960
Email: Brian.Smiley@doj.ca.gov

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ, Petitioner, v. **M. MARTEL, et al.,** Respondents.	CIV S-08-0347-LEW-CMK-P **APPLICATION TO TRANSFER PETITION FOR WRIT OF HABEAS CORPUS TO THE SOUTHERN DISTRICT**

Respondents respectfully moves this Court to transfer the petition for writ of habeas corpus to the United States District Court, Southern District of California.

I

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted in the Superior Court of the State of California, County of San Diego on May 19, 2006, of three counts of aggravated sexual assault of a child (Pen. Code[1], § 269), six counts of committing a forcible lewd act upon a child (§ 288, subd. (b)(1)), and one count of committing a lewd act upon a child 14 or 15 years old (§ 288, subd. (c)(1)). He was sentenced to

1. All further statutory references are to the Penal Code, unless otherwise specified.

fifteen years to life, plus eight years, eight months. Dkt. 1, p. 1.

On February 15, 2008, Petitioner filed a petition for writ of habeas corpus with this Court alleging that: (1) the trial court erroneously admitted evidence of Petitioner's alleged prior sexual assaults on his wife and sister-in-law and (2) the trial court improperly excluded a portion of the defense expert witness' testimony. Dkt. 1, p. 4.

II

ARGUMENT

Pursuant to 28 U.S.C. § 2241, subdivision (d), an application for writ of habeas corpus by a person in custody under the judgment and sentence of a state court *must* be filed "in the district court for the district wherein such person is in custody or in the district court for the district within which the state court was held which convicted and sentenced him." (*See United States ex rel. Ruffin v. Mancusi*, 300 F.Supp. 686 (E.D.N.Y. 1969) ["Proper venue for this application lies only in the Western District of New York, where the Petitioner is in custody, or in the Southern District, within which the Petition was convicted and sentenced. 28 U.S.C. § 2254(d)."] Although this Court and the United States District Court for the Southern District of California have concurrent jurisdiction, in terms of traditional venue consideration, the Southern District is clearly the most appropriate forum for adjudication. It is in the Southern District that all material events took place, that all pertinent records are currently located, and that all critical witnesses currently reside. Thus, the matter should be transferred to the Southern District and, should an order directing the Respondents to file a reply issue by the Southern District, such reply should be served upon the Senior Assistant Attorney General of the San Diego Office of the California Attorney General. (*Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494 (1972); *Bell v. Watkins*, 692 F.2d 999, 1013 (5th Cir. 1982) cert. Den., 464 U.S. 843 (1983); *Laue v. Nelson*, 279 F.Supp. 265 (N.D. Cal. 1968). See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev., 1038, 1160-1161.

///

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Fernandez v. Martel, et al.** No.: **CIV S-08-0347 LEW CMK P**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 28, 2008, I served the attached **Application to Transfer Petition for Writ of Habeas Corpus to the Southern District** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

Alberto Fernandez
CDCR No. F-25887
Mule Creek State Prison
P.O. Box 409040
Ione, CA 95640

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 28, 2008, at Sacramento, California.

/S/ BRIAN G. SMILEY
Declarant

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ,

Petitioner,

vs.

M. MARTEL, et al.,

Respondents.

No. CIV S-08-0347-LEW-CMK-P

ORDER

______________________________/

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondents' request to transfer this action (Doc. 7) to the United States District Court for the Southern District of California.

The petition attacks a conviction entered by the San Diego County Superior Court. While both this court and the United States District Court for the Southern District of California have concurrent jurisdiction, see Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), any and all witnesses and evidence necessary for the resolution of petitioner's application are more readily available in the Southern District, see id. at 499 n.15; 28 U.S.C. § 2241(d). Therefore, respondents' motion to transfer this matter will be granted.

Accordingly, IT IS HEREBY ORDERED that:

1. The court's March 27, 2008, order is vacated;

2. Respondent's request to transfer this matter (Doc. 7) to the United States District Court for the Southern District of California is granted; and

3. The Clerk of the Court is directed to transfer this matter to the United States District Court for the Southern District of California and close this file.

DATED: April 29, 2008

Craig M. Kellison

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALBERTO FERNANDEZ,

vs. CASE NO. **2:08-CV-00347-JAM-CMK**

M. MARTEL,

ORDER OF REASSIGNMENT

The court, having considered the appointment of **Judge John A. Mendez**, finds the necessity for reassignment of the above captioned case, and for notice to be given to the affected parties.

IT IS THEREFORE ORDERED that:

The above captioned case shall be and is hereby **REASSIGNED** from

Senior Judge Ronald S.W. Lew, to **Judge John A. Mendez**

for all further proceedings. The new case number for this action, which must be used on all future documents filed with the court, is:

2:08-CV-00347-JAM-CMK

All dates currently set in this reassigned action shall remain pending subject to further order of the court.

Dated: May 1, 2008

GARLAND E. BURRELL, JR, Chief
United States District Judge

JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

2254

FILING FEE PAID Yes ___ No ✓

IFP MOTION FILED Yes ___ No ✓

COPIES SENT TO Court ✓ ProSe

FILED MAY - 2 2008 CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA BY ___ DEPUTY

I (a) PLAINTIFFS: **Alberto Fernandez**

DEFENDANTS: **M. Martel**

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Amador (EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Alberto Fernandez
PO Box 409040
Ione, CA 95640
F-25887

ATTORNEYS (IF KNOWN)

'08 CV 0816 JLS CAB

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT (For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐1	☐1	Incorporated or Principal Place of Business in This State	☐4	☐4
Citizen of Another State	☐2	☐2	Incorporated and Principal Place of Business in Another State	☐5	☐5
Citizen or Subject of a Foreign Country	☐3	☐3	Foreign Nation	☐6	☐6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT: ☐ 110 Insurance; ☐ Marine; ☐ Miller Act; ☐ Negotiable Instrument; ☐ 150 Recovery of Overpayment &Enforcement of Judgment; ☐ 151 Medicare Act; ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans); ☐ 153Recovery of Overpayment of Veterans Benefits; ☐ 160 Stockholders Suits; ☐ Other Contract; ☐ 195 Contract Product Liability

REAL PROPERTY: ☐ 210 Land Condemnation; ☐ 220 Foreclosure; ☐ 230 Rent Lease & Ejectmant; ☐ 240 Tort to Land; ☐ 245 Tort Product Liability; ☐ 290 All Other Real Property

TORTS — PERSONAL INJURY: ☐ 310 Airplane; ☐ 315 Airplane Product Liability; ☐ 320 Assault, Libel & Slander; ☐ 330 Federal Employers' Liability; ☐ 340 Marine; ☐ 345 Marine Product Liability; ☐ 350 Motor Vehicle; ☐ 355 Motor Vehicle Product Liability; ☐ 360 Other Personal Injury

PERSONAL INJURY: ☐ 362 Personal Injury- Medical Malpractice; ☐ 365 Personal Injury - Product Liability; ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY: ☐ 370 Other Fraud; ☐ 371 Truth in Lending; ☐ 380 Other Personal Property Damage; ☐ 385 Property Damage Product Liability

CIVIL RIGHTS: ☐ 441 Voting; ☐ 442 Employment; ☐ 443 Housing/Accommodations; ☐ 444 Welfare; ☐ 440 Other Civil Rights

PRISONER PETITIONS: ☐ 510 Motions to Vacate Sentence Habeas Corpus; ☒ 530 General; ☐ 535 Death Penalty; ☐ 540 Mandamus & Other; ☐ 550 Civil Rights

FORFEITURE/PENALTY: ☐ 610 Agriculture; ☐ 620 Other Food & Drug; ☐ 625 Drug Related Seizure of Property 21 USC881; ☐ 630 Liquor Laws; ☐ 640 RR & Truck; ☐ 650 Airline Regs; ☐ 660 Occupational Safety/Health; ☐ 690 Other

LABOR: ☐ 710Fair Labor Standards Act; 720 Labor/Mgmt. Relations; ☐ 730 Labor/Mgmt. Reporting & Disclosure Act; ☐ 740 Railway Labor Act; ☐ 790 Other Labor Litigation; ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY: ☐ 422 Appeal 28 USC 158; ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS: ☐ 820 Copyrights; ☐ 830 Patent; ☐ 840 Trademark

SOCIAL SECURITY: ☐ 861 HIA (13958); ☐ 862 Black Lung (923); ☐ 863 DIWC/DIWW (405(g)); ☐ 864 SSID Title XVI; ☐ 865 RSI (405(g))

FEDERAL TAX SUITS: ☐ 870 Taxes (U.S. Plaintiff or Defendant); ☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES: ☐ 400 State Reappointment; ☐ 410 Antitrust; ☐ 430 Banks and Banking; ☐ 450 Commerce/ICC Rates/etc.; ☐ 460 Deportation; ☐ 470 Racketeer Influenced and Corrupt Organizations; ☐ 810 Selective Service; ☐ 850 Securities/Commodities Exchange; ☐ 875 Customer Challenge 12 USC; ☐ 891 Agricultural Acts; ☐ 892 Economic Stabilization Act; ☐ 893 Environmental Matters; ☐ 894 Energy Allocation Act; ☐ 895 Freedom of Information Act; ☐ 900 Appeal of Fee Determination Under Equal Access to Justice; ☐ 950 Constitutionality of State; ☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☒ 5 Transferred from another district (specify) EASTERN CA ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 DEMAND $ Check YES only if demanded in complaint: JURY DEMAND: ☐ YES ☐NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE 5/2/2008 ~~SIGNATURE OF ATTORNEY OF RECORD~~ [signature]